IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 700 of 1991

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

and

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

PRAFUL D LOHANA

Appearance:

MR KT DAVE APP for appellant

NOTICE SERVED for Respondent No. 1, 3, 4

UNSERVED-EXPIRED (N) for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

and

MR.JUSTICE A.L.DAVE

Date of decision: 06/11/2000

ORAL JUDGEMENT (Per : MR.JUSTICE A.L.DAVE)

This Criminal Appeal arises of the judgment and order recorded by the learned Sessions Judge, Rajkot, in Sessions Case No. 47/88, on 18th May, 1991, acquitting the respondents to the charge for offences punishable under sections 302, read with sections 34 and 120-B of the IPC and section 37 (i) read with section 135 of the Bombay Police Act. The facts of the case can be narrated in a narrow compass as follows :

1. The respondent no.4 married to deceased Mudatali Pyarali. It is the case of the prosecution that the respondent no. 4 had an affair with the respondent no.3. They, therefore, conspired to do away with Mudatali Pyarali, and for that purpose, they hired service of respondents nos. 1 and 2 on payment, the money for which were raised by pledging ornaments of respondent no.4.

1.1. On 26th February, 1988, when deceased Mudatali who was returning after performing his prayer on his scooter , he was alleged to have been intercepted in the Bahucharaji Mata Lane in Rajkot by the accused nos. 1 and 2 at about 8-30 to 9-00 PM and was assaulted upon by him with knife. The assault caused multiple injuries, which ultimately resulted into death of the deceased. At the time of the assault, according to the prosecution, Raniben Hasmukhbhai and witnesses Daklo and Danabhai Laxmanbhai saw the incident. They immediately went to the spot to rescue the deceased. The assailants ran away and the deceased was taken to the Hospital in an auto-rickshaw. On being taken to the Hospital, the deceased was taken to the Emergency Ward where he was examined by Dr. R.R.Agrawal and was declared dead at 9-25 PM. There is a Chowky in Rajkot Civil Hospital where information regarding incident was given. On the basis of that, an entry was made and information was sent to Rajkot City 'B' Division Police Station by telephone. Entry No. 23/88 was made on that basis. In the early hours on 24th February, 1988, at about 1-00 AM, Prabhatbhai Merubhai who was working in the office of the deceased for about three years declared about the incident and the FIR was recorded on the basis of the information given by him. The case was registered, investigation made and ultimately on finding evidence against the present respondents, chargesheet was filed by the Investigating Agency in the court of the learned Chief Judicial Magistrate, Rajkot. Since the case was triable exclusively by the court of Sessions, the case

was committed to the Court of Sessions by the learned Chief Judicial Magistrate, Rajkot. Sessions case was registered and charge was framed against the accused persons for the offences of murder and conspiracy as stated above. The accused persons pleaded not guilty to the charge and expressed their desire to face the trial.

1.2. The prosecution led evidence both oral and documentary. After considering the contentions raised by the prosecution and defence, the learned Sessions Judge came to the conclusion that the prosecution had failed to establish the guilt of the accused. The learned Sessions Judge found that three witnesses could not have identified the assailants because of the darkness. According to the learned Sessions Judge, the test identification parade was a farce. There is no evidence to show that the accused nos. 3 and 4 had conspired for doing away with the deceased, although he observed that the accused nos. 3 and 4 were in illicit connection. But that by itself, according to the learned Sessions Judge, would not indicate existence of conspiracy and participation of these accused persons in the conspiracy. The learned Sessions Judge, therefore, ultimately, acquitted the accused persons of the charges which they were facing, giving benefit of doubt to them.

2. This is an appeal preferred by the State of Gujarat against the said judgment recording acquittal of the accused persons. The respondent no.2 is reported to have expired. Non-bailable warrants were served on respondents nos. 1, 3 and 4, but they have chosen not to appear before this court.

3. We have heard the learned APP Mr.Dave for the appellant-State. He has raised a number of contentions assailing the judgment and order. He has taken us through the judgment and order as well as the evidence to support his contentions.

3.1. According to him, certain observations made by the learned Sessions Judge regarding character of the accused nos. 3 and 4, are not relevant. Apart from that, according to him, the learned Sessions Judge has committed an error in holding that witnesses could not have identified the assailants.

4. In our opinion, the question of identification of the assailants at the time of incident is of vital importance. Once it is found that there is no error on this count by the learned Sessions Judge, the other contentions loose importance. We have gone through the

evidence and we find that there is evidence to indicate that the light, at the time of the incident and at the place of the incident, was not sufficient for the witnesses to identify the assailants. The Panchnama and the map of the scene of the offence along with the evidence in that connection indicate that there was insufficient light. Added to this is the fact that witness Gulamhusen Ramjanali (EX-82) who states that the incident occurred at night, many people had gathered there including ladies, but he could not identify them because of darkness. If this is so, in our opinion, the learned Sessions Judge can not be said to have committed any error in giving benefit of doubt to the accused persons by not accepting the evidence of the eye witnesses. If the case against accused nos. 1 and 2 runs under the cloud of doubt, then the case against accused nos. 3 and 4 would also be covered under the same cloud as they are only facing the charge of conspiracy.

5. Besides, this major defect in the prosecution evidence viz. the possibility of eye witnesses not identifying the assailants, the prosecution case also appears to have other defects.

5.1. We find that the statements of these eye witnesses were recorded belatedly, as against the fact that they do not disclose the identity of assailants to the people who had gathered at the spot after the incident, which was a natural action that could be expected of them.

5.2. The Test Identification Parade in our opinion was not properly performed. There is evidence to indicate that the witnesses had opportunity to see the accused persons just before the Test Identification Parade. This would further weaken the depositions of eye witnesses and thereby the prosecution case.

6. It needs hardly be stated that this is an acquittal appeal, wherein the court would ordinarily not interfere unless the order is found to be perverse and palpably illegal or erroneous. The learned APP was at loss to indicate any such illegality or error committed by the learned Sessions Judge. We also do not find any error or illegality in the impugned judgment and order calling for any interference. We are, therefore, not inclined to interfere with the impugned judgment and order recorded by the learned Sessions Judge, Rajkot, in Sessions Case No. 47/88.

7. We, therefore, hereby dismiss the appeal confirming the judgment and order rendered by the learned Sessions Judge, Rajkot, in Sessions Case No. 47/99 on 18th May, 1991.

(MS R.M.DOSHIT J)

(A.L.DAVE J)

JOSHI